



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

April 13, 2012

CBCA 2594-TRAV

In the Matter of MICHAEL J. ROMANSKY

Michael J. Romansky, Denver, CO, Claimant.

Deborah Nicholson, Manager, Finance and Accounting Division, Bureau of Reclamation, Department of the Interior, Denver, CO, appearing for Department of the Interior.

DANIELS, Board Judge (Chairman).

In the guise of a request for an “advance decision” pursuant to 31 U.S.C. § 3529 (2006), we are asked in this case to arbitrate a dispute between two offices of the Bureau of Reclamation.

Bureau employee Michael J. Romansky traveled from his permanent duty station in Denver, Colorado, to Folsom, California, on many occasions during 2010 and 2011. The Management Services Office (MSO) believes that he should have been paid only seventy-seven percent of the per diem allowance for Folsom while on travel, which MSO calls “temporary duty extended” (TDE) because of the number of days the employee was in travel status. MSO also believes that all of Mr. Romansky’s per diem benefits should be taxable because his travel to a single location was extensive over a period of more than one year.

The Technical Service Center (TSC), within which Mr. Romansky works, opposes MSO’s positions. TSC, noting Bureau policy that “[m]anagers determine the type of assignment,” says that on each occasion that the employee traveled to Folsom, it determined that he was on temporary duty (TDY), not temporary duty extended. TSC also considers that because Mr. Romansky traveled to Folsom intermittently and none of his assignments there was lengthy, his per diem benefits should not be considered taxable.

Background

Mr. Romansky is a geotechnical engineer with particular expertise in rock mechanics, especially the design and construction of large excavations and support for those excavations. He works on many dam projects for the Bureau. Mr. Romansky is heavily involved in the design and construction of an auxiliary spillway to provide flood protection and reduce safety risks at Folsom Dam, a joint project of the Bureau and the United States Army Corps of Engineers. Because of unexpected conditions encountered during construction of the Folsom Dam spillway, he has been required to travel to the construction site frequently to assess foundation conditions and evaluate contractor proposals to address them.

During the period from January 7, 2010, through June 24, 2011, Mr. Romansky traveled to Folsom on seventeen different occasions. The first trip was planned to last eighteen days, but was extended for an additional twelve because Mr. Romansky's expertise was needed to respond to an emergency at the site. TSC requested, and MSO agreed, that although the Bureau generally considers trips longer than twenty-nine days to be TDE and this trip lasted for thirty days, it should still be considered TDY. Each of the other trips lasted between five and nineteen days. In all, during this period, Mr. Romansky spent 245 days in Folsom and 285 days in Denver.

During the period from July through November 2011, Mr. Romansky traveled to Folsom on four occasions. Each of these trips lasted between three and twelve days. We gather that for these trips, MSO mandated a reduced per diem allowance of seventy-seven percent of the maximum. TSC expects the Folsom Dam project to continue to require Mr. Romansky's support, with attendant additional travel.

Mr. Romansky explains that while he was in Folsom, he, like the contractor's construction crew, worked six days a week, beginning at 5:30 a.m. each day. His typical workday lasted from ten to twelve hours, sometimes continuing into the evening after a break for dinner. After returning to a hotel, he had to monitor electronically the status of three other projects on which he was working, so that he could keep those projects moving forward. He maintains that because the workday was so extensive, he had no time to shop or prepare meals. TSC management believes that the employee's explanation is accurate.

When Mr. Romansky traveled to Folsom, he stayed in the hotel which is closest to the dam site. The government rate for lodging at that location, during the period of time with which we are concerned, was \$101 (and later \$99) per night, and the Bureau reimbursed him for spending up to that amount on lodging. Other hotels in the area charge less, but they are further from the site and traffic in the region is heavy. The hotel at which Mr. Romansky stayed offered a free breakfast to guests and also has a kitchenette in each room. MSO has

negotiated with this hotel a rate of \$77 per night for Bureau employees who stay there. TSC determined that during the period in question, the best monthly rate available for a furnished apartment or a hotel room in the Folsom area was \$2500 under a lease with a minimum duration of three months.

Discussion

With regard to the first contested matter, whether the Bureau should have imposed a reduced per diem rate for Mr. Romansky's trips to Folsom, we agree with TSC. The Federal Travel Regulation (FTR) allows an agency to set a per diem rate lower than the prescribed maximum when two conditions are present:

- (a) When [the] agency can determine in advance that lodging and/or meal costs will be lower than the per diem rate; and
- (b) The lowest authorized per diem rate must be stated in [the employee's] travel authorization in advance of [his] travel.

41 CFR 301-11.200 (2009, 2010, & 2011). For the trips prior to July 2011, because MSO raised the issue after the employee traveled, rather than before, setting a reduced per diem rate for those trips does not meet the second prong of this test. Mr. Romansky is entitled to full per diem for each of the days in question that he spent in Folsom from January 2010 to June 2011. *Patrick S. Twohy*, GSBKA 15491-TRAV, 01-1 BCA ¶ 31,408.

For Mr. Romansky's trips after June 2011, a reduced per diem rate is inappropriate because the first prong of the FTR test is not met. As TSC points out, there is no reason to believe that this employee's meal costs will be lower than the amount prescribed by the Administrator of General Services for Folsom. The fact that breakfast is available without charge at the hotel at which Mr. Romansky stays is irrelevant for two reasons: (a) because the meal is not served until after he must be at work and (b) because the FTR states that "[a] . . . complimentary meal provided by a hotel/motel does not affect [an employee's] per diem." 41 CFR 301-11.17. The fact that the hotel rooms contain kitchenettes is also irrelevant because Mr. Romansky's management reasonably determined that in light of the demands of his work (six days a week, ten to twelve hours a day, plus evening monitoring of other projects), he had no time to shop for and prepare meals. As to the cost of lodging, TSC properly acknowledges that when Mr. Romansky pays seventy-seven dollars per night for his hotel room, he is entitled to be reimbursed only that amount. *See id.* 301-11.100. However, as TSC notes, the hotel is free to charge a higher rate at any time, and if it does so, requiring the employee to pay the difference between the government rate and seventy-seven dollars per night would be unfair. *Twohy*. As TSC also notes, staying in the one hotel which

is close to the dam site shortens the employee's commute and, considering that the employee stays in Folsom on average less than half of each month, is less expensive than paying for lodging there on a monthly basis. We advise that Mr. Romansky should be authorized the full per diem allowance for his trips to Folsom after June 2011, as well as for his earlier trips to that location.

The two offices have discussed at length whether Mr. Romansky's trips should be considered TDY or TDE. The answer is settled by the Bureau's "Long-Term Assignment Travel Guidance," which provides that an assignment of more than twenty-nine days is considered TDE. Only one of the trips lasted more than twenty-nine days, and that one was extended due to an emergency and was considered by MSO to remain TDY. We appreciate MSO's point that Department of the Interior guidance states that unless a break between trips is at least forty-five days in duration, an assignment is generally considered to be long term. The guidance also says, however, that the true intent of an assignment governs. TSC, which is responsible for Mr. Romansky's projects, maintains that when this employee must go to Folsom is dependent on the contractor's progress in construction. Each trip, TSC says, is a separate temporary assignment. If the travel could be undertaken only after a hiatus of forty-five days, construction would be delayed or the safety of the excavation work would be put at risk. Management personnel, rather than administrative or budget officers, are in the best position to make these judgments. We conclude that the true intent of management, in sending Mr. Romansky to Folsom, was to make temporary duty assignments, not to post him to the dam site for an extended period of time.

The tax question posed by MSO requires the interpretation and application of a provision of the Internal Revenue Code, 26 U.S.C. § 162(a). This provision states:

There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including –

. . . .

(2) traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business

. . . For purposes of paragraph (2), [with an exception not relevant here] the taxpayer shall not be treated as being temporarily away from home during any period of employment if such period exceeds 1 year.

The offices are concerned about whether Mr. Romansky's intermittent stays in Folsom qualify as "being temporarily away from home" for more than a year, such that the money he was reimbursed for lodging, meals, and other travel expenses was taxable. (Another way of stating the issue, using the phraseology of Bureau guidance, is whether Mr. Romansky was on indefinite assignment, since the total duration of the period in which he needed to visit Folsom was expected to be more than one year.)

Under 31 U.S.C. § 3529, the Board is authorized only to issue decisions concerning claims involving expenses incurred by federal civilian employees for official travel and transportation, and for relocation expenses incident to transfers of official duty station. *See id.* § 3702(a)(3). Construing provisions of the Internal Revenue Code is beyond our authority. As the offices know, the Internal Revenue Service (IRS) has opined on the effect of the one-year limitation in Revenue Ruling 93-86 and subsequent revenue rulings and memoranda. For interpretation of these pronouncements and answers to other questions about tax laws, we suggest that agencies consult the IRS and decisions of the various United States courts which have jurisdiction over tax cases.

STEPHEN M. DANIELS
Board Judge